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No. 82-341

In the Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Interstate Commerce Commission is not required to equalize rates to two ports served by one origin carrier under joint rates with different connecting carriers over whose rate-making the origin carrier has no actual control.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 674 F. 2d 1055. The decisions of the Interstate Commerce Commission in Docket No. 36491 (Sub-No. 1) (Pet. App. 28a-65a, 66a-91a) and the Commission's decision in Docket Nos. 31098 and 33447 on reopening (Pet. App. 92a-109a) are reported at 357 I.C.C. 382, 359 I.C.C. 592, and 364 I.C.C. 269, respectively.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1982. A petition for rehearing was denied on June 1, 1982 (Pet. App. 114a-115a). The petition for a writ of certiorari was filed on August 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This litigation involves the issue of the Commission's authority to determine what constitutes a showing of "common control" sufficient to establish a prima facie case for relief in discrimination cases under 49 U.S.C. (Supp. IV) 10741(b) where a carrier serves different ports indirectly under joint rates.[1] Common control is an essential element in a discrimination case because, in order to discriminate, a carrier must be responsible for the treatment accorded to both the preferred and the prejudiced ports.[2] If the Commission finds common control—and the other elements of a

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[1]"Joint rates" are rates between two or more carriers. Under the law prevailing at the time this case was decided by the Commission and the court of appeals, a joint rate could not be changed without the concurrence of all parties to the rate, nor could it be cancelled over the objection of one of the parties without Commission approval. Each carrier participating in a joint rate accrues "divisions," i.e., a portion of the revenues received. Divisions are usually established by agreement among the carriers. Thus, when a participant in a joint rate desires to change that rate, it usually will propose to its joint rate partners what each participant's division of the new rate will be. This may be arrived at simply by applying established percentage shares to the new rate, or it may effect a change in the percentage share of the participants.

The Staggers Rail Act of 1980, Pub. L. No. 96-448, Section 217(a)(1), 94 Stat. 1916, added a new Section to the Interstate Commerce Act (49 U.S.C. (Supp. IV) 10705a), which substantially modified the Act with respect to joint rates and divisions. However, the court below expressly limited its holding to the law as it existed prior to enactment of the Staggers Rail Act (Pet. App. 3a).

[2]To establish that rail rates are discriminatory, i.e., that they treat one shipper or locality differently from another under comparable conditions, a complainant must show that a disparity in rates exists, that it is competitively injured by the disparity and that a carrier, or group of carriers, controls the rates to both the preferred and the prejudiced ports. If the complainant makes the proper showing, then the railroads can justify the rate disparity on the basis of different transportation conditions. *Chicago Board of Trade* v. *Illinois Central R.R.*, 344 I.C.C. 818, 840 (1973), aff'd *sub nom. Chicago & E.I.R.R.* v. *United States*, 384 F. Supp. 298 (N.D. Ill. 1974), aff'd, 421 U.S. 956 (1975).

Section 10741(b) case—it traditionally has prescribed equalized rates by issuing a so-called "alternative order". An alternative order requires the carrier to remove the discrimination by lowering the rate to one port, raising the rate to the other, or equalizing both rates at some point in between. Absent a finding of common control, a carrier can adjust its rates to any of a group of ports it serves under joint rates even if it cannot obtain concurrences from some of the other carriers involved.

Petitioner challenges the Commission's authority to determine that, where joint rates are involved, the proper standard of proof is actual control by the complained of carrier to both the allegedly prejudiced and preferred ports.

2. In the *Corpus Christi I* cases[3] (ICC Docket Nos. 31098 and 33447), which were decided in 1954 and 1961 and which were never appealed, the Commission determined that the carriers serving certain Texas ports, together with the originating lines in the origin territory, directly and effectively controlled the rates to the preferred ports (Galveston, Houston, and Port Arthur) and the prejudiced port (Corpus Christi). *Nueces County Navigation District No. 1* v. *Abilene & S. Ry.*, 291 I.C.C. 459, 470 (1954); *Nueces County Navigation District No. 1* v. *Atchison, T. & S.F. Ry.*, 315 I.C.C. 155, 162 (1961). The Commission in effect presumed common control. Rather than requiring actual proof of control (see 291 I.C.C. at 469-470; 315 I.C.C. at 162), it viewed the carriers as an interlocking network jointly controlling the rates to and from the ports. Thus, their mere participation in joint rates coupled with the fact that their tracks intersected supplied the basis for the Commission's finding that there was common control.

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[3]For the sake of convenience, we will use the same nomenclature as the court of appeals in referring to these cases. See Pet. App. 25a-26a.

Having found common control and no different transportation conditions to justify a rate disparity, the Commission concluded that the assailed grain export rates, "are, and for the future will be," unduly prejudicial to Corpus Christi, and unduly preferential of Galveston, Houston and the other Texas ports to the extent that the rates to Corpus Christi exceed those to Galveston and Houston. 291 I.C.C. at 470; 315 I.C.C. at 163. The orders implementing the Commission's reports (Pet. App. 110a-111a, 112a-113a) required that the defendant carriers cease and desist from the practices that resulted in the undue prejudice found to exist.

In the 1970's the Commission began to take a more detailed look at common control. Rather than merely presuming control, it developed the concept of "actual control," i.e., focusing on the particular circumstances of connecting carriers' refusal to concur in changes where joint rates were involved. In a series of decisions, the Commission found that when a connecting carrier refused to participate in joint equalized rates, and it was not shown that the origin and connecting carriers were acting in concert, there was no common control of the rates to the differently treated ports. See *Soybeans, Midwest to Chicago & Gulf Ports, Export*, 335 I.C.C. 883 (1970), vacated as moot, 416 U.S. 953 (1974); *Corn & Soybeans Midwest to Gulf Ports for Export*, 339 I.C.C. 595, modified, 349 I.C.C. 1 (1974), vacated by the Commission as moot, No. INS 8576 (June 30, 1980), appeal dismissed as moot *sub nom. Nueces County Navigation District* v. *United States of America*, Civil Action No. CA—3-43-1253-D (N.D. Tex. Aug. 25, 1982).[4]

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[4]Petitioner erroneously states (Pet. 6 n.7) that district court proceedings in the last cited case remain in abeyance.

3. Proceedings in the *Wheat* cases (ICC Docket No. 36491 (Sub-No. 1)) began in 1977 when the St. Louis San Francisco Railway (Frisco)[5] published reduced rates on wheat from origins in Oklahoma and Kansas to various Texas ports but not to Corpus Christi. Frisco had lowered the rates to the other Texas ports to meet rail and truck rate competition; it had not done so for Corpus Christi because Frisco had no direct line to that port and the connecting rail carriers to Corpus Christi (the Missouri Pacific Railroad (MoPac) and the Southern Pacific Transportation Company (SP)) had refused to concur in a lowered joint rate equivalent to that published for the other ports.[6]

Various Corpus Christi port and shipping interests protested on grounds that the rates were unduly preferential of the other Texas ports and prejudicial to Corpus Christi, in violation of former Section 3(1) of the Interstate Commerce Act, (49 U.S.C. 3(1)) now codified at 49 U.S.C. (Supp. IV) 10741(b).

In December 1977, the Commission issued a decision (*Wheat I*) holding that Frisco did not actually control the disparate rates and that Frisco had made a good faith offer of division of the proposed reduced joint rates to the connecting carriers serving Corpus Christi (Pet. App. 52a-56a). The Commission added the "good faith offer of divisions" test to the actual common control standard developed in the 1970 Commission decisions discussed above in order to ensure that carriers do not evade a common control finding by making a divisions offer so low that the connecting

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[5]Frisco is now merged into the Burlington Northern, Inc.

[6]Concurrences were obtained from the Fort Worth and Denver Railway (FWD) and the Missouri-Kansas-Texas Railroad (MKT), carriers that serve the other ports at issue here, but not Corpus Christi.

carriers are effectively forced to refuse to concur (Pet. App. 53a-54a).[7]

In February 1979, the Commission, in *Wheat II*, affirmed its previous findings (Pet. App. 66a-91a), and ordered that the *Corpus Christi I* cases be reopened to determine whether those decisions were consistent with the *Wheat* cases. The Commission then published a Federal Register notice reopening the *Corpus Christi I* cases and requesting comments on the issue of common control of rates to the Gulf ports.[8] The Commission also obtained a remand of the record in the *Wheat* cases from the court of appeals so that it might reconsider its decisions in those cases in light of its reopening of the *Corpus Christi I* cases.

In the resulting joint decision on reopening issued in both proceedings (*Corpus Christi II*), the Commission, after extensive analysis, expressly abandoned its former network common control theory and held that, in the determination of discriminatory rates issues involving ports under Section 10741(b), it would utilize an analysis of actual control by the origin carriers, applying the good faith offer of divisions test enunciated in the *Wheat* cases (Pet. App. 96a-99a, 101a). The Commission accordingly vacated the inconsistent decisions in the *Corpus Christi I* cases and reaffirmed its holdings in *Wheat I* and *Wheat II*. The Commission also rejected petitioner's argument that, even if common control is absent, it should prescribe specific rates to be charged. It explained that common control is a substantive element of a

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[7]Under this test, an origin carrier will have to establish that it has made a good faith offer of divisions before it can claim that nonconcurrence of the connecting carriers deprived it of common control. If the Commission determines from the evidence submitted that a reasonable offer was made, then good faith will be shown (Pet. App. 53a, 83a-84a).

[8]Fifteen parties filed comments. See Pet. App. 95a.

discrimination case and that, therefore, it would not prescribe rates absent common control or a finding of some other violation of the Act (Pet. App. 103a-106a).

4. The court of appeals affirmed in all aspects the Commission's decision adopting the actual common control standard and the vacation of the *Corpus Christi I* orders (Pet. App. 1a-27a). The court held that the adoption of the new standard was consistent with recent congressional policy to permit railroads greater freedom to raise or lower rates and was consistent with prior decisions of this Court. It observed that Congress, in Section 10741(b), gave the Commission a mandate to protect against "unreasonable" discrimination and that the determination whether a discrimination is undue or unreasonable has always been a question committed to the Commission's discretion. Moreover, the court pointed out that Congress has never sanctioned the "network common control" standard or indicated that that standard should "be frozen into the administrative process of determining whether joint rates are discriminatory" (Pet. App. 19a (footnote omitted); *id.* at 19a-20a n.9).

Turning to petitioner's procedural claims, the court of appeals rejected the view that the Commission should have proceeded by adjudication and not rulemaking when it reopened *Corpus Christi I* (Pet. App. 21a-23a). Similarly, the court concluded (*id.* at 23a) that the vacation of the continuing *Corpus Christi I* orders that conflict with the new policy "may reasonably be considered an appropriate method within the Commission's discretion by which it could implement its adoption of the new actual common control standard." On its own motion, the court of appeals dismissed as moot the petitions seeking review of the *Wheat* cases on grounds that Corpus Christi is no longer prejudiced by having to pay rates higher than those applicable to

the other Texas ports and thus has received the relief sought in the *Wheat* litigation (Pet. App. 6a-7a & n.4).[9]

ARGUMENT

Notwithstanding the complicated history of this litigation, this case presents no legal issue of general importance warranting this Court's review. The Commission's decision to permit railroads charged with rate discrimination to demonstrate that they lack the control over joint rates necessary to establish a violation of Section 10741(b) if, despite their good faith efforts, they have been unable to obtain necessary concurrences in joint line rates from some of their connecting carriers is well within the agency's discretion. The decision of the court of appeals, upon which we essentially rely, correctly affirmed the Commission's interpretation of its responsibilities under the discrimination statute and does not conflict with the decisions of this Court or of any other court of appeals.

Moreover, the significance of the challenged ruling is limited by virtue of the lower court's explicit limitation of its decision to the law as it existed prior to enactment of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (see Pet. App. 3a). Although the new statute preserves existing law with regard to the Commission's authority to

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[9]Following the Commission's decision in *Wheat I*, MoPac concurred in a reduced joint rate to Corpus Christi, and rates were equalized, technically mooting the *Wheat* cases. In order not to thwart judicial review of the adoption of the actual common control standard, however, the Commission decided not to discontinue the *Wheat* proceedings (Pet. App. 69a-71a). The court of appeals held that the *Wheat* determinations were in fact moot and dismissed, but did not vacate, those cases since "[n]o suggestion of mootness is made with regard to the *Corpus Christi II* issues" (Pet. App. 7a). As the court of appeals noted (*ibid.*), *Corpus Christi II* has various "continuing effects." The Commission vacated its continuing rate equalization orders in *Corpus Christi I* and thereby deprived Corpus Christi interests of a former remedy by which to attack rail rate disparities.

prescribe port relationships, 49 U.S.C. (Supp. IV) 10741(b), it also adds numerous provisions that affect the regulation of railroads participating in joint rates and that would have to be taken into consideration in future cases.

1. Petitioner principally argues (Pet. 8-18) that the Commission's determination that carrier responsibility, i.e., common control,[10] is necessary for a Section 10741(b) violation, so that a carrier will not be held accountable merely because it participates in joint rates, conflicts with decisions of this Court. But as the court of appeals correctly observed (Pet. App. 9a-10a, 13a), the Commission (*id.* at 97a-100a) based its analysis squarely on *Texas & Pac. Ry.* v. *United States*, 289 U.S. 627, 649-650 (1933), and *Central R.R.* v. *United States*, 257 U.S. 247, 259 (1921), decisions holding that mere participation in joint rates does not make connecting carriers partners, and that a carrier must "effectively participate" in both rates if an order correcting the disparity is to run against the carrier.[11]

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[10]The lower courts have firmly established that in order to establish a violation of Section 10741(b), all four elements of a discrimination case—a disparity in rates, competitive injury, common control, and evidence that the disparity in rates is not justified by transportation conditions—must be shown. *Chicago Board of Trade* v. *Illinois Central R.R., supra*, 344 I.C.C. at 840; *Chicago & E.I.R.R.* v. *United States, supra*, 384 F. Supp. at 300-301; *Harborlite Corp.* v. *ICC*, 613 F. 2d 1088 (D.C. Cir. 1979); *New York* v. *United States*, 568 F. 2d 887, 898 (2d Cir. 1977); *A. Lindberg & Sons, Inc.* v. *United States*, 408 F. Supp. 1032, 1037 (W.D. Mich. 1976); *Baltimore & O.R.R.* v. *United States*, 391 F. Supp. 249, 259 (E.D. Pa. 1975).

[11]Petitioner unsuccessfully attempts to minimize the relevance of these decisions by arguing (Pet. 9-10) that in *Texas & Pac. Ry.* the Court held that the ports did not come within the discrimination statute, and that *Central* involved a transit privilege rather than discrimination between two ports. *Central* is significant, however, for its general holding that railroads are not engaged in unjust discrimination if they are powerless to influence the actions of other carriers. 257 U.S. at 257-258.

Furthermore, there is no merit to petitioner's indirect attack on the Commission's determinations that (1) a substantive violation of the Act is required before the

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As for *Texas & Pac. Ry.*, this Court stated, well after the terms "port and port district" were added to the statute in 1935:

> For the principle announced in *Central R. Co.* v. *United States* and *Texas & Pacific R. Co.* v. *United States, supra*, is applicable only where the Commission is directing the carriers to remove the discrimination. *Those cases hold that the Commission may not require carriers to do what they are powerless to perform.*

New York v. *United States*, 331 U.S. 284, 342 (1947) (emphasis added). Thus, this Court's decisions in *Central* and *Texas & Pac. Ry.* provide a firm basis for the Commission's position and remain good law today.

Moreover, petitioner's reliance (Pet. 8-12) on other decisions of this Court is misplaced. *Houston, E. & W. T. Ry.* v. *United States*, 234 U.S. 342 (1914), merely states that discrimination was a primary concern of Congress in promulgating the Interstate Commerce Act. *Louisville & N.R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925), involved a reparations order for excessive charges and a rate reasonableness question, neither of which were at issue in the instant litigation where the carrier's intent was to lower rail rates to meet truck competition. In *Sloss-Sheffield*, the Court stated that "the establishment of a joint rate *by the concurrence of connecting carriers* is necessarily the act of each, because the establishment of the rate is done *by their joint agreement*." 269 U.S. at 233 (emphasis added). In the *Wheat* cases, however, Frisco did not lower the rate to Corpus Christi only because it could not achieve concurrences from the connecting carriers. The decision in *St. Louis S.W. Ry.* v. *United States*, 245 U.S. 136 (1917), like that in *Sloss-Sheffield*, rested primarily on reasonableness, and not on discrimination, grounds. 245 U.S. at 145. In addition, the passage from *St. Louis S.W. Ry.* quoted by petitioner (Pet. 12) establishes only that a connecting carrier is not immune from the discrimination provisions of the Act merely because its rails do not reach the locality that is being discriminated against. But that does not mean that every connecting carrier must necessarily be liable in every case in which discrimination in joint rates is shown, even where, as here, the connecting carrier has unsuccessfully sought the concurrence of the other carriers to a nondiscriminatory joint rate. Furthermore, *Sloss-Sheffield, C., I. & L. Ry.* v. *United States*, 270 U.S. 287 (1926), and *United States* v. *Illinois Central R.R.*, 263 U.S. 515 (1924), are all decisions *affirming* the Commission's finding of unreasonable discrimination under a narrow standard of review. This case, of course, involves the vastly different question

Commission can prescribe a rate under 49 U.S.C. (Supp. IV) 10704;[12] and (2) even if the Commission has the authority to prescribe rates absent a finding of common control or a violation of some other section of the Act, it need not exercise that authority. Without expressly challenging the merits of the Commission's view, petitioner contends (Pet. 16-18) that the Commission and the court of appeals failed adequately to consider this Court's decisions in *New York* v. *United States*, 331 U.S. 284 (1947), and *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949). The record, however, does not support this claim. On the contrary, it establishes that the Commission carefully distinguished *New York* and *Ayrshire* from the agency's determination in this litigation (Pet. App. 103a-106a) and that the Commission's interpretation is reasonable and consistent with its statutory authority.[13]

As the Commission observed (Pet. App. 104a), there are fundamental differences between *New York* and *Ayrshire* and this case. First, *New York* and *Ayrshire* raised questions of rate reasonableness as well as discrimination. In

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whether the Commission properly exercised its discretion not to hold carriers responsible for discrimination in specified circumstances.

Finally, petitioner cannot rely on the old Commission cases cited (Pet. 15), because they preceded the Commission's decision to alter its policy on common control.

[12]Section 10704(a)(1) provides that when the Commission, after a full hearing, decides that a rate charged does or will violate the Act, it may establish a specific rate to be charged. See *Arizona Grocery* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 387 (1932).

[13]Like the Commission, the court below took this Court's decisions in *New York* and *Ayrshire* into account (Pet. App. 10a n.6). However, it failed squarely to decide when rate prescription is appropriate because it lacked the factual context necessary for such a determination in view of the mootness of the *Wheat* cases. Nevertheless, by affirming *Corpus Christi II* (Pet. App. 17a-21a), the court implicitly agreed with the Commission's analysis that *New York* and *Ayrshire* do not foreclose adoption of the actual common control standard.

contrast, the *Wheat* cases, like *Texas & Pac. Ry., supra*, arose purely in a discrimination context. Second, the Commission noted (Pet. App. 105a) that in *New York* the Court was considering the Commission's power to adjust rates on a broad territorial basis, whereas the *Corpus Christi I* and *Wheat* cases involved shipments from limited origins to ports in one state. Finally, while the *New York* and *Ayrshire* decisions are instances where the Court affirmed the Commission's determination that rates should be prescribed, the Commission concluded here that it would be inappropriate to prescribe rates under the facts presented. For these reasons, the Commission correctly found (Pet. App. 104a-106a) that even if language in *New York* and *Ayrshire* could be read to support the view that the Commission *may* find unreasonable discrimination and prescribe rates absent a finding of common control, the decisions do not *require* that it do so absent a determination that prescription is necessary to correct rates that are otherwise unlawful. To read the cases otherwise, the Commission explained (Pet. App. 105a), would lead to an anomalous result. The harsher remedy of a rate prescription would apply when one of the Section 10741 prerequisites (i.e., common control) is missing, while the more flexible remedy of an alternative order would apply when all four factors are present.

2. Petitioner also suggests (Pet. 12, 15-16) that the Commission must continue to interpret common control in the same way as it has in the past. However, no authority is cited to support the contention that the Commission is bound by its prior policy of viewing the carriers as an interlocking network and effectively presuming control. Indeed, the decisions of this Court fully support the Commission's authority to adopt a new view based upon reconsideration of the ever changing conditions in the industries that it regulates, so long as its determination is consistent

with the statutory limits upon its authority. *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). The Commission's determination that the public interest will be better served under a common control standard that takes into account the facts and circumstances of each case clearly meets this test. As the court of appeals pointed out (Pet. App. 8a), Section 10741(b) directs the Commission to protect persons, places, ports, or types of traffic from "unreasonable discrimination." What constitutes an "unreasonable" discrimination, therefore, is for the Commission to determine. *New York* v. *United States, supra*, 331 U.S. at 347; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353 (1940); *Manufacturers Ry.* v. *United States*, 246 U.S. 457, 481 (1918).[14] The network common control standard, moreover, was merely a creation of the Commission that, as the court of appeals correctly found (Pet. App. 19a-20a), was never sanctioned by Congress. Accordingly, the Commission's decision to change its interpretation in view of the policy of the 4-R Act to permit rail carriers greater rate flexibility[15] was a permissible exercise of its discretion.

3. Petitioner's contention (Pet. 19-21) that the Commission should not inquire into divisions in a discrimination proceeding ignores the fact that the good faith offer of

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[14]Petitioner urges (Pet. 21-23) that the court of appeals erred in granting deference to the Commission's interpretation of its responsibilities under Section 10741(b). The decisions of this Court, however, have firmly established the legal principle that courts should accord substantial deference to an agency's construction of the statute that it is charged with administering. E.g., *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981); *Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 539 (1940).

[15]See *Atchison, T. & S.F. Ry.* v. *United States*, 606 F. 2d 442, 445-446 (4th Cir. 1979); *Harborlite* v. *Southern Pacific*, 364 I.C.C. 585, 587, 594 (1981).

divisions test will protect shippers and port interests like petitioner by ensuring that rail carriers cannot evade a common control finding by making a divisions offer so low that the connecting carriers are effectively forced to refuse to concur. See Pet. App. 84a-86a, 102a-103a. While it is true that, in general, divisions disputes do not justify denying relief to an adversely affected party (e.g., *Louisville & N.R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925)), this does not mean that the Commission can never consider divisions in performing its duties under the Interstate Commerce Act. In light of the requirement of carrier responsibility for a Section 10741 violation, the Commission correctly concluded (Pet. App. 102a) that "the issue of a good faith offer of divisions is properly within the scope of our inquiry."

4. There similarly is no merit to petitioner's claim (Pet. 24) that if the Commission's rate determinations in the *Wheat* cases are moot, they should have been remanded to the Commission with directions to vacate the decisions and dismiss the proceedings.[16] In the circumstances of this case, the court of appeals correctly decided to dismiss as moot only the petitions for review "that raise issues directed solely to the invalidity of the *Wheat* determinations" (Pet. App. 7a).[17]

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[16]Petitioner's suggestion (Pet. 23-24) that the *Wheat* cases are not moot is specious. As the court of appeals observed (Pet. App. 7a n.4), petitioners themselves conceded below that the *Wheat* adjudications are of no continuing effect. Following the Commission's decision in *Wheat I*, MoPac concurred in a reduced rate to Corpus Christi equivalent to the reduction published for the other Texas ports. As a result, Corpus Christi is no longer prejudiced by the Frisco rates that originally caused this litigation.

[17]Petitioner's appeals of the 1977, 1979 and 1980 decisions in the *Wheat* adjudication were docketed as Nos. 78-1348, 79-1816 and 80-1842 in the court of appeals. Petitioner filed a separate petition for review of the 1980 decision in the *Corpus Christi* cases that was docketed as No. 80-1843 below. The court of appeals determined (Pet. App.

Where it appears on appeal that a controversy is "entirely moot," it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. E.g., *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The court below, however, properly concluded (Pet. App. 7a n.4) that despite the mootness of the *Wheat* adjudications, *Corpus Christi II* is not moot. In addition to reaffirming the Commission's prior decisions in the *Wheat* cases, the Commission's decision in *Corpus Christi II* concluded a rulemaking proceeding that determines the common control standard that will apply for the future. Furthermore, it accomplished the vacation of the continuing port equalization orders in *Corpus Christi I*, thus depriving Corpus Christi interests of a former remedy by which to attack rail rate disparities. Accordingly, the court of appeals had for its consideration "actual matters in controversy essential to the decision of the particular case before it." *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920). In view of the continuing effects of the July 1980 decision, it was permissible for the court of appeals to review the Commission's decision in *Corpus Christi II*, and there are no grounds for arguing that the mootness of the *Wheat* cases necessitates an order directing that agency proceedings in those cases be vacated.

5. Finally, petitioner errs in asserting (Pet. 25) that this case raises broad questions of transportation law warranting this Court's review. The final Commission decision

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7a n.3) that the petition in No. 80-1843 "raises still viable issues," but it dismissed the three petitions that sought review of the *Wheat* cases. As a practical matter, it would have been difficult, if not impossible, for the court below to vacate the portions of the Commission's decision that are in fact moot. This is so because the *Corpus Christi II* decision decided both the moot *Wheat* cases and the viable *Corpus Christi I* cases on reopening.

involved here was issued before enactment of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and review in the court of appeals was under the old law (see Pet. App. 3a). However, the Staggers Rail Act will apply in any future discrimination cases involving ports,[18] and petitioner (and any other aggrieved parties) will have the opportunity to challenge any proposed unequalized rates to Corpus Christi on grounds of discrimination at such time as they are proposed.[19] Consequently, this case merely marks the conclusion of an old era in discrimination law. It cannot be said to present legal issues that are of broad general importance today.

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[18]Although the Staggers Rail Act did not specifically amend the discrimination statute as it applies to ports, 49 U.S.C. (Supp. IV) 10741(b), the legislative history indicates that the Commission is "to exercise its remaining power under section 10741 only where it is needed to prevent abuses of market power where discrimination cannot be justified by differences in demand for services or costs." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 104 (1980). Adoption of the actual control standard which looks closely at the facts and circumstances of each particular case and only permits the Commission to find a violation of the Act if a carrier or group of carriers is actually responsible for the rates to both ports is clearly in keeping with congressional intent.

[19]As noted above, rates to Corpus Christi have been equal to those charged to the other Texas ports since 1978, when MoPac voluntarily concurred in reduced joint rates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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